Office Supreme Court, U.S.
FILED
MAY 12 1962
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 870

MAX GELLER and ANNE GELLER,

Petitioners,

—against—

HOLLAND-AMERICA LINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the

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October Term, 1961

No. 876

Max Geller and Anne Geller,

Petitioners,

—against—

Holland-America Line,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

No question of general importance is involved, or was decided below.

Petitioners admittedly purchased their Passage Contract from Levine's Ellenville Travel Service and possessed it for at least a week and "perhaps two or three weeks" prior to embarkation (R 6, 7, 8, 9).* Max Geller *knew* that the envelope he received contained the Passage Contract and he handed it to respondent's representative on boarding the ship (R 10, 11). Anne Geller *looked at* the Passage Contract either at the agency or at home and three times identified it at her deposition, although she also said "I see it is a ticket, I realize that must have been the ticket we had. However, to say that I remember this ticket, no" (R 7, 8, 9).

* Unless otherwise designated, numbers in parentheses with prefix "R" refer to respondent's appendix in the Court of Appeals and numbers with prefix "A" to petitioners' appendix in that Court.

Lawrence Levine, owner of the Ellenville agency and known by Max Geller "for the last thirty-six years" (R 11), by an affidavit which is not disputed, stated that he delivered the Passage Contract to petitioners on October 28, 1961 (R 16). The Contract itself, and the stub which petitioners received from Levine on request, confirm this date (A 32, 34).

In short, it is undisputed that the Passage Contract on which respondent relied below was issued to, used by and in petitioners' possession for six weeks before embarkation and that suit was not commenced until over 18 months from the date of the alleged accident.

On respondent's motion for summary judgment petitioners did not deny that the Passage Contract on which respondent relied (A 34) was the one they bought from Levine and surrendered at embarkation. *Neither Max nor Anne Geller ever submitted affidavits in opposition to this motion.* The Courts below held only that petitioners raised no genuine issue of fact as to their receipt and use of this Passage Contract and, on familiar law, that the one year suit clause was valid inasmuch as it was incorporated in the body of the Contract.

Petitioners' "reasons" for granting the writ are disingenuous. It was not "the collecting of the entire ticket with appended terms at embarkation" that resulted in "rendering the petitioners completely ignorant as to their rights." If they were ignorant, their ignorance was self imposed inasmuch as it was established by respondent's affidavits, and not denied by petitioners, that they had possession of the Passage Contract for some six weeks before embarkation.

Answering Petitioners' Point I

The prevailing rule was established by this Court in *The Majestic*, 166 U. S. 375, viz.: If conditions or limitations are printed in the body of the contract, or are referred to in the body of the contract and thus made a part of it, they are valid. As was said in *Baron v. Compagnie Generale Transatlantique*, 2 Cir., 108 F. 2d 21 (pp. 22, 23):

> "The distinction laid down in The Majestic, 166 U. S. 375, is between provisions in a steamship ticket which amount only to notices and *provisions which are formally incorporated into the contract of passage.* Provisions that are mere notices are not operative unless actually brought to the passenger's attention. Baer v. North German Lloyd, 2 Cir., 69 F. 2d 88; Maiburun v. Hamburg-American S.S. Co., 2 Cir., 77 F. 2d 304; Bellocchio v. Italia Flotte, 2 Cir., 84 F. 2d 975; The Kungsholm, 2 Cir., 86 F. 2d 703. On the other hand, *provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they are read by the passenger, provided they are not unlawful in content.* The Leviathan, 2 Cir., 72 F. 2d 286; Murray v. Cunard S.S. Co., 235 N. Y. 162" (italics ours).

In *Foster v. Cunard White Star, Ltd.*, 2 Cir., 121 F. 2d 12, indistinguishable from the case at bar, the Court in affirming summary judgment for the carrier said:

> "For we find a direct reference in the box on the face of the ticket to the terms and conditions of the contract, that these were carried on the ticket's face and back into the box itself, so that the final condition is actually found there, and the signature of the carrier

appears immediately thereafter. Thus the limitation is directly made a part of the contract of carriage" (p. 13).

The cases are in accord, *Murray* v. *Cunard S.S. Co.*, 235 N. Y. 162; *Siegelman* v. *Cunard White Star, Ltd.*, 2 Cir., 221 F. 2d 189; *Baron* v. *Compagnie Generale Transatlantique, supra.* There are none *contra.*

Answering Petitioners' Point II

The Court of Appeals said:

"Appellee submitted an affidavit by Lawrence Levine, owner of the Ellenville Travel Service, in which he stated that he delivered the Contract to appellants. *Appellants did not contradict this statement in any manner*, but merely asserted that, since they had not opened the envelope *that they received from Levine*, they did not know whether or not they received the Contract. This assertion by appellants was not sufficient to create a genuine issue of fact and, therefore, the motion for summary judgment was properly granted" (Petitioners' Appendix p. 4; italics ours).

On such facts the absence of material issues of fact was established and the motion was properly granted. *Dyer* v. *MacDougall*, 201 F. 2d 265; *Reynolds* v. *Maples*, 214 F. 2d 395; *Magee* v. *The Coca-Cola Co.*, 232 F. 2d 596; *Baer* v. *North German Lloyd*, 69 F. 2d 88, 89; *Lewitsky* v. *Matson Navigation Company*, 134 F. Supp. 441.

Answering Petitioners' Point III

In their attempt to escape the consequences of their own alleged failure to read the Passage Contract, petitioners ascribe sinister motives to respondent's compliance with the customary practice of collecting the ticket on embarkation. They do not refer, however, to the firmly established rule that *the possession of the ticket*, as here, charged them with notice of its provisions as a matter of law. In *Foster v. Cunard White Star, Ltd.*, 2 Cir., 121 F. 2d 12, the Court held:

> "Plaintiff is charged with notice of the limitation, since her brother, who purchased the ticket for her (as well as for himself, as he was also a passenger), *had it in his possession for some 17 days before the voyage commenced*" (p. 13; italics ours).

See also *Siegelman v. Cunard White Star, Ltd., supra* (10 or 11 days); *Rogers v. Furness, Withy & Co.*, 103 F. Supp. 314 (19 days); *Mauer v. Zim Israel Nav. Co.*, 177 F. Supp. 69 (about 2 weeks).

In view of petitioners' ample opportunity to read the ticket, the words of Judge Cardozo in *Marran v. Cunard Steamship Co.*, 235 N. Y. 162, 166-7, are particularly apt:

> "The plaintiff is not helped by his surrender of the ticket when he went aboard the ship, after he had then held it several days with ample time to read it. A contract valid and reasonable in its inception does not become invalid and unreasonable thereafter * * *. If some aid of memory is required, his business is to make for himself a note of the conditions, or to procure from the carrier a copy, which doubtless would be given for the asking. There is little ground for the belief that this plaintiff would have examined his ticket within

the period of forty days, though he had taken it ashore on the termination of the voyage. * * * He had abundant opportunity both on the ship and later to inquire about the terms of carriage, if he supposed them to be important. We should indulge in the merest speculation if we were to say that the surrender of the ticket was the cause of the omission of the notice. Whether it was or not, his contract remained the same."

Petitioners' Citations

Petitioners' references to the cases are misleading. Their quote from *Farr* (Petition, p. 7), stated by them to be what was *held*, is characterized by that very Court in the next sentence as, "* * * not the stated rule * * *". Summary judgment was granted to the carrier in *Farr*.

In *Mulvihill* (pp. 7, 8) the Court did not *hold*, as petitioners state, that a triable issue of fact was present but granted summary judgment to the carrier.

In *Bellocchio* (p. 13), immediately following the quote which petitioners state is a "holding", the Court said "* * * but since there may be excuses for it which do not appear, we leave the question open."

In *McCaffrey* (pp. 13, 14), as in *Bellocchio*, judgment was denied because the limitation provision was *not* incorporated into the contract of carriage.

Petitioners fail to point out that the quote from *Siegel* (p. 11) comes from the dissent.

Petitioners' Other Misconceptions

Compare petitioners' statement (pet. 4, 9) that "Both Max and Anne Geller, under oath, have sworn that they have never seen the tickets either prior to or after embarkation" and "[i]gnore the sworn testimony of the Gellers that they did not see nor possess the passage tickets [] with their actual testimony (R 7-11):

ANNE GELLER

"A. I think I picked up the tickets. I am not quite certain if I did or my husband did" (R 7).

[]

"Q. Who would most likely have picked up those tickets, or were they delivered to you? A. No; it would be either my self or my husband" (R 7).

[]

"Q. My question to you is: Do you recall ever taking a look at the ticket to see if you have the right vessel? A. Yes, we did. I remember looking at them, where we had to go to leave. We were not quite sure. Then we realized it was Hoboken and what time the ship was sailing.

Q. Where did you look at the ticket, in the Levine Agency in Ellenville? A. Either in the Levine Agency or at home" (R 7).

[]

"Q. You checked the ticket in order to make sure when you were going to leave and from what port in New York; is that right? A. That's right.

Q. From what port did you find that you were going to embark? A. Hoboken" (R 7).

"Q. You found that out by looking at the ticket? A.

Q. You do recall that clearly, do you not? A. Definitely.

Q. The only thing you do not quite recall is whether you were at home in the hotel when you checked the ticket or whether you were in the Levine Agency in Ellenville? A. That's right" (R 8).

* * * * * *

"Q. What was given to either you or your husband by the Levine Agency in Ellenville in return for the check? A. An envelope containing tickets" (R 8).

* * * * * *

"Q. How long in advance of your departure on this boat from Hoboken did you have the ticket? A. Probably two weeks or perhaps a week.

Q. Not any longer? A. Perhaps two weeks or three weeks" (R 8).

* * * * * *

"Q. But in any event, at least two weeks before your New York departure you knew you had the ticket and it was in your possession? A. Yes" (R 8).

* * * * * *

"Q. There did come a time before you sailed on the STATENDAM, before you left home in Kerhonkson, that you knew you had the ticket? A. That's right.

Q. That is the ticket I am referring to here, this Defendant's Exhibit 1; is that right? A. That's right" (R 8, 9).

* * * * * *

"Q. So that at least one week before December 10th, when you departed from Hoboken, you or your husband knew that you had this ticket at home in your possession. A. That's right" (R 9).

* * * * * *

"Q. You are sure that ticket, that Defendant's Exhibit 1 for identification, was in the possession of you and your husband at least a week before you sailed, is that correct? A. That's right" (R 9).

. . . . . .

MAX GELLER

"Q. Do you remember having a ticket to go on the ship? A. Yes.

Q. How did you find that out? A. I had them in an envelope" (R 10).

. . . . . .

"Q. You do recall just saying a couple of minutes ago or perhaps less that she handed you the tickets. A. I knew I had the tickets. When we went on the boat I was the one that gave them the tickets" (R 10).

. . . . . .

"A. I know there were tickets there.

Q. How do you know that? A. I know the people I deal with" (R 11).

. . . . . .

"A. I was sure the tickets were in there.

Q. Why were you sure, merely because at the moment you could rely on them at the agency? A. Yes. I know the people for the last thirty-six years" (R 11).

Although petitioners say that Levine's affidavit, the Court will note, is *made upon information and belief* (p. 9), the fact is that only a part of his affidavit was "on information and belief", viz., that part which relates to the undisputed fact that he delivered the passage contract to petitioners *in person* rather than by certified mail (R 16).

Petitioners' attempts to generate an emotional appeal contrast unfavorably with their failure to inform the court that the Passage Contracts were delivered to them several weeks before embarkation, and their failure to inform the court that within three months of the date of the alleged accident respondent put their proctors on notice that respondent would rely on the Passage Contract defenses (R 20).

It is significant that petitioners' experienced admiralty proctors never asked respondent for a copy of the Passage Contract (R 21-22) although they were employed by petitioners within three months of the alleged accident and were advised by respondent that reliance would be placed on the Passage Contract defenses. It is a fair inference that the Passage Contract terms were known; otherwise a copy would have been asked for. Note the identity of the attorneys who represented the steamship company in the passage contract case of *Moore* v. *American Scantic Line*, 2 Cir., 121 F. 2d 767.

Moreover, as regards the collection of the entire ticket, Mrs. Geller testified that, when he handed it to respondent's representative on boarding the ship on December 10, 1958, "they gave me back something", yet, as of September 19, 1960, he testified he *had never looked to see what it was* that was handed back to him (Record 123, 125). He can hardly be heard to complain that this envelope did not contain a copy of his ticket.

This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent

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